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09/776,130

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EXAMINER

SAETHER, FLEMMING

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | | |
|------------------------------|--------------------------------------|---|--|
| Office Action Summary | Application No. 09/776,130 | Applicant(s) GEROGIANNI, DIMITRA G. | |
| | Examiner Flemming Saether | Art Unit 3677 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-11, 13-21, 23-34, 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cupps (US 5,991,739) in view of Hanson (US 4,971,409) and Harrington (US 5,895,454). Cupps discloses the general concept of brokering food orders over the Internet wherein a plurality of buyers have access to a database of a plurality of unaffiliated restaurants that deliver food (Fig. 1 and 7). Each of the buyers inputs their location and the broker displays restaurants that deliver to that location and indicates specials (Fig. 8). Each of the restaurants displays a menu of available food items and price (Fig. 9), any one of which may be considered "special". Once an item is found, the buyer initiates a transaction and is given a response or confirmation from the restaurant which includes a delivery time (column 11, line 26-27). The delivery time is real time and inherently would include any backlog on the part of the seller since the seller is the one providing the delivery time (column 11, line 11-12). Cupps does not disclose the real time delivery time being provide prior to a selection be made by the customer. Hanson discloses a food order and delivery system wherein the real time delivery time, based at least in part on actual deliveries, is communicated to the customer as a transaction is being made (column 16, line 64-68) so the customer can take that into account prior to placing an order. At the time the invention was made, it

would have been obvious for one of ordinary skill in the art to communicate the real time delivery time to the customer in Cupps prior to the order being placed so that the customer could make a more informed decision. Modified Cupps does not disclose the real time delivery time communicated to the customer prior to a transaction being initiated. Harrington discloses a system using the internet where in addition to other criteria such as price etc... the delivery time is included to the customer in a hierarchical scheme, in other words rank, form a plurality of sellers for comparison to the customer so that a determination on purchasing an item can be based on the delivery time (column 5, lines 25-61) and teaches to include a maximum delivery time preference (column 5, line 26-27). Harrington further teaches to provide alternatives to the customer if the criteria is not met (column 6, lines 4-9). At the time the invention was made, it would have been obvious for the person of ordinary skill in the art to communicate the real time delivery time to the customer in modified Cupps in a manner as disclosed in Harrington so that delivery time could be used by the customer as criteria for determining which food item to order before beginning any transaction.

Claims 12, 22 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cupps (US 5,991,739) in view of Hanson (US 4,971,409), and Harrington (US 5,895,454) as applied to claims 1, 13 and 24 above and further in view of Cotter (US 4,797,818). Cotter teaches the selection of a restaurant or seller for a delivery order automatically based on real time delivery time (column 2, line 21-31). At the time the invention was made, it would have been obvious for one of ordinary skill in the art to

provide for the automatic selection of a seller in modified Cupps based on real time delivery time as disclosed in Cotter in order to save time to the customer.

In response to Remarks

After consideration of applicant's amendments and remarks the rejection remains unchanged.

Applicant argues both that the prior art does not teach all the limitations of the claims and also that the combination would not have been motivated. In response, the examiner respectfully disagrees for the reasons as follows.

Applicant first argues Cupps, in that Cupps does not teach "real time" since it requires an intermediately operator. In response, the examiner maintains that even with the operator Cupps anticipates the "substantially real time" limitation. There is no requirement that "substantially real time" be void of an intermediate operator. Again applicant is reminded that the claim limitations are to be given their broadest reasonable interpretation¹ and while interpreted in light of the specification, limitations from the specification are not read into the claims².

¹ See *in re Pearson*, 181 USPQ 641 (CCPA 1974).

² See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

In regards to the “real time” limitation applicant requests evidence for the generalized statement “‘there is in fact no such thing’ as ‘real time’”. In response, evidence can found in the “real time” be prefaced by “substantially”.

Furthermore, with the previous responses not withstanding, Cupps makes it clear that communications between the buyers and venders can be completely done though the Internet (column 12, first complete paragraph) and it has also been held to be obvious to automate a manual operation³ which in this case would be automating the operator.

As regards Hanson, applicant is arguing the rejection piecemeal and one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references⁴. Specifically, applicant is arguing features Hanson not relied on to teach. Hanson is only relied upon to disclose a food order and delivery system wherein the real time delivery time, based at least in part on actual deliveries, is communicated to the customer as a transaction is being made (column 16, line 64-68) so the customer can take that into account prior to placing an order. Again, even though the communication is through a person it does not mean it is not “real time” for the same reasons as discussed above in regards to Cupps.

³ *In re Venner*, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958)

⁴ See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

As regards Harrington, applicant is again arguing the rejection piecemeal arguing Harrington is lacking features for which it is not relied upon. Harrington is only relied upon for the teaching of a system using the internet where in addition to other criteria such as price etc... the delivery time is included to the customer in a hierarchical scheme, in other words rank, form a plurality of sellers for comparison to the customer so that a determination on purchasing an item can be based on the delivery time (column 5, lines 25-61) and teaches to include a maximum delivery time preference (column 5, line 26-27) and to provide alternatives to the customer if the criteria is not met (column 6, lines 4-9).

As in the previous arguments, applicant argues that there is no teaching suggestion or motivation for the combination of Cupps, Hanson and Harrington since the rational set for by the examiner is not discussed in the references themselves and that the examiner is relying on old case law. In response, there is simply no requirement that motivation be show. As discussed previously, the Supreme Court has recently ruled that obviousness no longer requires a teaching, suggestion or motivation⁵. The Court decided that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results” and that “design incentives and other market forces can prompt variations”. Thus when applying the recent decision from the highest court it can be seen the combination of Cupps, Hanson and Harrington would have been obvious. As discussed

⁵ See *KSR Int'l v. Teleflex, Inc.*, No 04-1350 (U.S.S.C. April 30, 2007)

above, the references teach all the element of the claims which are combinable according to known methods in a computer system and to predicable results with design and market forces prompting any variations necessary to make them user friendly in with the computer. In general, the instant invention is simply combining a number of features into a single system to make for an overall superior system which, since all the features are already known, would have been obvious.

Applicant argues that “common sense” cannot support obviousness and incorrectly assumes that “common sense” equates to Official Notice. In response, to be clear, the examiner is not taking Official Notice and is only relying on common sense as an alternative reason for obviousness. As supported in MPEP 2141 “In short, the focus when making a determination of obviousness should be on what a person of ordinary skill in the pertinent art would have known at the time of the invention, and on what such a person would have reasonably expected to have been able to do in view of that knowledge. This is so regardless of whether the source of that knowledge and ability was documentary prior art, general knowledge in the art, or *common sense*.” [italic added]. In that regard, it would simply have been common sense to provide the buyer with all the information available so that the buyer can make a more informed decision. Its general knowledge that the more informed a buyer is the more likely the buyer is make the right decision thus leaving the buyer satisfied to use the system again.

Applicant questions how real time delivery time would support the buyer making a more informed decision. In response, if the real time delivery time for a particular food item were not till tomorrow and the buyer was hungry now then the buyer would be informed not to buy that particular item and select another food item with a much shorter real time delivery time so as to satisfy the buyer's hunger.

As regards Cotter, applicant is again arguing the rejection piecemeal arguing Cotter is lacking features for which it is not relied upon. Cotter is only relied upon for it teaches the selection of a restaurant or seller for a delivery order automatically based on real time delivery time (column 2, line 21-31).

Applicant next argues Cotter does not disclose automatic selection of a seller based on real time delivery information because in Cotter the order goes through an operator. In response, as discussed previously is no requirement that "substantially real time" be void of an intermediate operator. The claims, when given their broadest reasonable interpretation, do not preclude the use of an operator.

Furthermore, Cotter makes it clear that factors such as traffic patterns etc... often require selection of a seller which is not the closest which is all Cotter is relied upon to teach. The traffic patterns and other "local factors", Hanson discloses as real time.

Applicant mentions the dependent claims but, offers no further arguments thus no response is deemed necessary.

Applicant addresses the legal standard for obviousness but, as noted above that legal standard had been greatly changed by the Supreme Court thus again no further response is deemed necessary. See MPEP 2141.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Flemming Saether whose telephone number is 571-272-7071. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Flemming Saether
Primary Examiner
Art Unit 3677

/Flemming Saether/
Primary Examiner, Art Unit 3677